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Supreme Court, U.S.
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No. 04-405

IN THE

Supreme Court of the United States

MARGARET HUDSON,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

REPLY BRIEF

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I. REPLY TO RESPONDENT'S DUE PROCESS ARGUMENTS

Respondent argues that "[g]enerally speaking, the procedural arm of the Due Process Clause of the Fourteenth amendment (sic) does not apply to the adoption of a statute that affects more than a few people." Res. Br., p. 8. With one exception, the Circuit Court cases cited by Respondent in its brief at pp. 8-10 in support of its argument that the Due Process Clause does not apply in this case involved regulation that applied to the community in general or to a broad geographic area which distinguishes them from the case at bar.

In the one case cited by Respondent that involved a similar factual situation to that involved in the case at bar, *Brody v. City of Mason,* 250 F.3d 432 (6th Cir. 2001), the Sixth Circuit held that plaintiffs were entitled to procedural due process. 250 F.3d at 437. ("This Court has held that in the context of administrative zoning decisions, the process must provide sufficient notice to the affected landowners and an opportunity to be heard in opposition.") Unlike in the case at bar, in *Brody,* the plaintiffs were determined to have received procedural due process.

As Respondent notes in its Brief, "[t]here is no dispute that issues of proper notification to Petitioner arose in the context of legislation that increased the size of the existing historic district by 72 properties to reach a total of 157 properties in all." Res. Br., p. 8. Of these additional 72 properties, only 27 were considered to be historic and 45 non-historic structures in 1985. [Appendix E & F, Nos. 11 and 13, pp. 25(a) - 27(a).] The zoning action that is the focus of this appeal was limited to a specific, small geographic area and exceptionally affected a limited number of individuals who owned historic structures in that area.

As Judge Posner noted in a case relied upon by the Respondent, *Indiana Land Co., LLC v. City of Greenwood,* 738 F.3d 705 (7th Cir. 2004), the rationale for the general rule that procedural due process considerations do not apply to legislation is that legislation normally is general in scope rather than targeted on a specific individual and that its generality provides a safeguard that is a substitute for procedural protection. 378 F.3d at 710.

However, in *Indiana Land Co.,* Judge Posner recognized that legal principles are limited by their rationales. He noted that the tinier the group burdened by legislation, the weaker the equal burden rationale and the stronger the case for granting due process rights. 378 F.3d at 710. Justice Blackman made the same point in his concurring opinion in *O'Bannon v. Tour Court Nursing Center,* 447 U.S. 773 (1980), where he noted:

> "...When governmental action affects more than a few individuals, concerns beyond economy, efficiency and expedition tip the balance against finding that due process attaches. We may expect that as the sweep of governmental action broadens, so too does the power of the affected group to protect its interests outside rigid constitutionally imposed procedures. Moreover, the case for due process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual becomes more determinately within the decisionmaker's purview. For when government acts in a way that singles out identifiable individuals -- in a way that is

> likely to be premised on suppositions about specific persons -- it activates a special concern about being personally talked to about the decision rather than simply being dealt with." *Citing* L. Tribe, *American Constitutional Law,* § 10-7, pp. 503-504 (1978).

447 U.S. at 800-801.

In the case at bar the Due Process Clause applies because the zoning regulations applied to a limited geographic area and further applied to a limited number of structures in that geographic area. The individuals affected by the zoning regulations were known to the Respondent, Respondent knew the precise nature of the effect of the regulations on historic structures and the Respondent failed to use the most reasonable means to give notice to Ms. Hudson of the proposed zoning changes. In short, Ms. Hudson was exceptionally affected by the zoning regulations because those regulations were not general in application and applied to a limited geographic area. Even in that limited geographic area, her house was one of the regulated historic structures while other houses, which were not historic, were unregulated.

The Metropolitan Government of Nashville argues that there must be an immediate and drastic impact on an ownership interest to trigger the application of the Due Process Clause. Res. Br. 11-12 Respondent appears to equate property contemplated by the Takings Clause with property contemplated by the Due Process Clause. These two concepts are not coterminous. If they were, welfare recipients whose benefits the state had otherwise properly terminated could claim the state must pay them for the fair market value of such benefits. This is clearly not the law.

Compare, Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (holding that welfare benefits may not be taken away without giving the recipient notice and an opportunity to be heard) and *Schroeder v. City of Chicago,* 927 F.2d 957, 961 (7th Cir. 1991) (concluding the Takings Clause did not apply to allegedly improper termination of welfare benefits). The Due Process Clause recognizes a wider range of interests as property than the Takings Clause. *Pro-Eco v. Bd of Com'rs of Jay County, Ind.,* 57 F.3d 505, 513 (7th Cir. 1995).

In its papers, Respondent does not appear to dispute that under Tennessee law, Ms. Hudson has the property right to maintain and use her property as she desires. *See, Humes v. Mayor and Aldermen of Knoxville,* 20 Tenn. (1 Hump.) 403 (1839). In applying its due process analysis, this Court focuses on the property right which has been taken. See, *Lujan Labor Commissioner of California v. G & G Sprinklers, Inc.,* 532 U.S. 189 (2001) (Due process analysis focusing on a contractual right which was fully protected by an ordinary breach of contract suit). In the case at bar, Ms. Hudson has been deprived of a present entitlement, her right as an owner of real property to maintain and use her property as she wishes. Such a right is a property interest protected by the Due Process Clause. *See, Washington Ex. Rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121 (1928). There is no question in this case that Respondent deprived Ms. Hudson of this right. Its zoning regulations prohibited Ms. Hudson from using vinyl siding on her house.

Respondent argues that the Due Process Clause does not apply because Ms. Hudson has adequate post deprivation remedies under Tennessee law. The case Respondent relies upon for this proposition, *Hudson v. Palmer,* 468 U.S. 517 (1984) recognized that where pre-deprivation process is impracticable, an unauthorized negligent or intentional deprivation of property by a state employee does not

constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for loss is available. 468 U.S. at 533. The rule in the *Hudson* case does not apply in the case at bar because pre-deprivation process was not impracticable. Indeed, Tennessee law required that notice be given to Ms. Hudson. T.C.A. §13-7-406.

Even if the rule of *Hudson v. Palmer* applied in this case, Respondent's argument is flawed. Respondent's argument that Ms. Hudson should have appealed the denial of her request for a variance from the zoning guidelines is nothing more than an argument that Ms. Hudson has failed to exhaust her administrative remedies. The law is clear that in a 42 USC § 1983 action, there is no requirement that a plaintiff exhaust her administrative remedies as a precondition to the assertion of such a claim. *Patsy v. Florida Board of Regents,* 457 U.S. 496, 516 (1982).

Similarly, the Tennessee law of inverse condemnation does not provide Ms. Hudson with an adequate remedy. Under Tennessee law, a zoning regulation must be confiscatory and deprive a person of the beneficial use of their property to give rise to a cause of action for inverse condemnation. *Bayside Warehouse Co. v. City of Memphis,* 470 S.W.2d 375 (Tenn. App. 1971).

In short, the situation presented in the case at bar is the very evil which Congress intended to address and alleviate when it promulgated 42 USC §1983. Ms. Hudson has no adequate remedy under Tennessee law for Respondent's violation of her constitutional rights. This conclusion is evidenced by the opinion rendered by the Tennessee Court of Appeals in this case. [Appendix B, 3a-11a].

II. REPLY TO RESPONDENT'S SUPREMACY CLAUSE ARGUMENTS

The Respondent argues that the ruling by the Tennessee Court of Appeals does not conflict with the Supremacy Clause because of statements made by the Court in cases in which it adopted a state statute of limitations into federal law in regard to §1983 actions. The rationale for the adoption of state statute of limitations into §1983 actions is that because "[s]tatutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right of enforcement in perpetuity." *Felder v. Casey*, 487 U.S. 131, 140 (1988). However, this consideration does not apply to a judicially promulgated statute of repose which is virtually unheard of in litigation.

The law is clear that "[l]imitations periods are creatures of statute, not common law ... Therefore, limitations periods are established by legislation and not judicial fiat." *Kerr Glass Co. v. Wilson*, 880 P2d 414, 418 (Ok. App. 1994); *see, also, Acxiom Corp. v. Leathers*, 961 S.W.2d 735 (Ark. 1998); *Shewbrooks v. A C and S., Inc.*, 529 So.2d 557, 564 (Miss. 1988) ("Limitations on the time within which an action may be brought are created by statute only. They are legislative, not judicial acts."); *New York State Labor Rel. Bd. v. Wyckoff Hts. Hosp.*, 59 Misc.2d 284, 298 NYS2d 576, 582 (1969) ("In the absence of a statutory provision the Court does not have the power to introduce and enforce such a limitation.")

Indeed, under Tennessee case authority, the Tennessee Court of Appeals in this case exceeded its authority by judicially promulgating a statute of repose. In Tennessee decisions on public policy are made by the

Tennessee Legislature and the Tennessee Supreme Court. *North River Ins. Co. v. Johnson,* 757 S.W.2d 334, 336 (Tenn. App. 1988). The Tennessee Supreme Court has recognized that under the common law there were no fixed periods for the commencement of actions. *Brown v. Hipshire,* 553 S.W.2d 570, 571 (Tenn. 1977). The Tennessee Supreme Court has specifically recognized that "[t]he policy undergirding limitations of action is legislative policy, not judicial policy." *Id.* The Tennessee Court of Appeals in this case did not address the *Brown* case or cite any Tennessee Supreme Court decisions in the opinion it rendered in this case.

This Court has noted that "[b]ecause the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow a state law." *Felder v. Casey, supra,* 487 U.S. at 139. 42 U.S.C. §1988(a), which provides the means by which courts can consider and adopt principles of state law as federal law applicable to §1983 actions, states, in pertinent part, that:

> "The jurisdiction in civil and criminal matters ... for the protection of all persons in the United States and their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States; so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is

> held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ..."

Unfortunately, the Tennessee Court of Appeals in dismissing Ms. Hudson's §1983 claims never referred to the Supremacy Clause and apparently was unaware of the existence of 42 U.S.C. §1988(a). [Appendix B, 3a - 11a]

Under the provisions of 42 U.S.C. §1988(a), there is simply no legal basis for the Tennessee Court of Appeals to adopt a court made statute of repose and dismiss Ms. Hudson's §1983 claims by judicial fiat.

Applying the first step under the 42 U.S.C. §1988 analysis delineated in *Burnett v. Grattan,* 468 U.S. 42, 47 (1984), there is no federal statute of repose applicable in this case.

The second step in the applicable analysis directs a court to apply "the common law as modified by the Constitution and statutes of the forum state". *Burnett v. Grattan, supra,* at 47; 42 U.S.C. §1988(a). Tennessee is a common law state. The effect of Article XI, Section 1 (Article X, Section 2, Constitution of 1796) of the Tennessee Constitution was to adopt the common law of England as it stood in 1776 before the separation of the colonies. *State v. Alley,* 594 S.W.2d 381, 382 (Tenn. 1980). Under Tennessee common law, there is no statute of limitations or repose. The common law in Tennessee as declared by the Tennessee Supreme Court is that courts are without power to promulgate limitations of actions. *Brown v. Hipshire, supra.* There is no statute promulgated by the Tennessee Legislature nor any provision in the Tennessee Constitution which can

be cited as authority for the Tennessee Court of Appeals' ruling in this matter. Respondent does not cite any such authorities in its Brief because they do not exist.

The final step in the 42 U.S.C. §1988 analysis is to determine whether the state law sought to be applied is consistent with the constitution and the laws of the United States. *Burnett v. Grattan, supra* at 47. "Any assessment of the applicability of state law to federal civil rights legislation ... must be made in light of the purpose and nature of the federal right." *Felder v. Casey,* 487 U.S. 131, 139 (1988).

The central purpose of the Reconstruction Era laws is to provide compensatory relief to those deprived of their federal rights by state actors. *Felder v. Casey, supra,* at 141. §1983 accomplishes this goal by creating a form of liability that, by its very nature, applies only against a specific class of defendants: governmental bodies and their officials." *Id.* The Tennessee Court of Appeals' judge made "statute of repose" undermines §1983. Its entire purpose is to minimize governmental liability and immunize government conduct. The rule of law promulgated by the Tennessee Court of Appeals in this case is inherently unfair because Respondent is benefiting from its violation of Ms. Hudson's right to procedural due process. Respondent's failure to give proper notice to Ms. Hudson necessarily delayed her assertion of her §1983 claim.

Moreover, the statute of repose promulgated by the Tennessee Court of Appeals is not a neutral and uniformly applicable rule of procedure; it is a substantive rule imposed only upon individuals seeking redress for injuries resulting from zoning regulations promulgated in violation of federal procedural due process requirements.

For these reasons, the statute of repose promulgated by the Tennessee Court of Appeals is clearly inconsistent with the applicable federal law, 42 U.S.C. §1983. The statute of repose created and applied by the Tennessee Court of Appeals stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Perez v. Campbell,* 402 U.S. 637, 649 (1971).

In short, the Tennessee Court of Appeals' adoption by judicial fiat of a statute of repose directly conflicts with the provisions of 42 U.S.C. § 1983 and §1988 and violates the Supremacy Clause.

CONCLUSION

Petitioner respectfully urges the Court to issue a Writ of Certiorari to the Tennessee Supreme Court so that the action taken by the Tennessee Court of Appeals, which has no basis in the law, will be reviewed and reversed.

Respectfully submitted,

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